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M E M O R A N D U M

VIA COURIER

TO: **Magalie Roman Salas**

FROM: **Ronald J. Jarvis**

DATE: **November 30, 2001**

RE: **Comments of Western Wireless Corporation (WT No. 01-316)**

Enclosed are an original and 4 copies of the Comments of Western Wireless Corporation on the Sprint and AT&T Petitions for Declaratory Ruling, in docket WT No. 01-316 both filed October 22, 2001.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 205554

In the Matter of	)	
	)	
Petitions of Sprint PCS and AT&T Corp.	)	
for Declaratory Ruling on Issues	)	
Contained in the Access Charge Litigation	)	
Sprint PCS v. AT&T	)	WT No. 01-316

COMMENTS OF
WESTERN WIRELESS CORPORATION

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COMMENTS OF
WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("Western Wireless"),[1] by its undersigned counsel and in response to the Commission's November 8, 2001 Public Notice[2] in the above-captioned matter, hereby submits its comments in support of the Sprint Petition for Declaratory Ruling filed October 22, 2001, and in opposition to the AT&T Petition for Declaratory Ruling filed on the same date. As set forth in greater detail below, Western Wireless contends that IXCs such as AT&T are cost-causers, and should be required to compensate CMRS carriers for the costs they cause when they use the CMRS carriers' networks to terminate or originate their traffic. Any other result unfairly imposes on CMRS carriers and their end-user customers the burden of

[1] Western Wireless is a leading provider of communications services in the Western United States. The company owns and operates wireless phone systems marketed under the Cellular One® national brand name in 19 states west of the Mississippi River. Western Wireless owns cellular licenses covering about 30% of the land in the continental United States. It owns and operates cellular systems in 88 Rural Service Areas (RSAs) and 18 Metropolitan Statistical Areas (MSAs) with a combined population of around 9.8 million people. Through the 2nd quarter 2001, Western Wireless d/b/a Cellular One® was providing service to 1,116,500 customers.

[2] Public Notice, "Sprint PCS And AT&T File Petitions For Declaratory Ruling On CMRS Access Charge Issues," DA 01-2618 (released November 8, 2001).

paying for IXC-imposed costs, effectively subsidizing the IXCs, their shareholders, and their long distance customers.

DISCUSSION

I. The Commission Should Grant Sprint's Petition for Declaratory Ruling

A. IXCs' Failure to Pay Access Charges Results in Unfair Cost Burden Shifting and May Cause Economic Distortions by Sending the Wrong Pricing Signals

Western Wireless agrees with Sprint that the IXCs' refusal to pay access charges to CMRS carriers is both faulty from a public policy point of view as well as a violation of prevailing law. Significantly, AT&T freely admits that it imposes costs on CMRS carriers when it originates and terminates its calls on their networks. *See* AT&T Petition at 14, ¶ 1. AT&T does not, however, concur that it should have to compensate CMRS carriers for these costs. By refusing to compensate CMRS carriers for the costs they incur in terminating and originating IXC traffic, AT&T and other IXCs have so far been able to shift the burden of these costs away from themselves to the end users and shareholders of CMRS companies.

Regardless of the other issues that must be considered in the analysis of this situation, Western Wireless submits that the overriding issue in this proceeding is one of simple fairness, *viz.*, who should pay for the costs incurred by CMRS in originating and terminating IXC traffic? As a matter of fairness, should, for example, Sprint PCS end users – *none of whom uses AT&T for long distance calls* -- be compelled to subsidize the long distance rates of AT&T's long distance customers, or help to protect the investment returns of AT&T's shareholders, by paying higher airtime rates to cover the additional costs imposed by AT&T in terminating its traffic on Sprint's network? When viewed in this light, it is clear that the cost-causers, *i.e.,* AT&T and other IXCs, should carry their own weight – otherwise, they are being subsidized artificially by unrelated entities.

Perhaps more importantly, exempting IXCs from the obligation to cover the costs they impose also sends the wrong economic signal, enabling AT&T and other IXCs to ignore material cost components of their services when arriving at their rate schemes, arguably allowing them to price at levels that do not recognize the "real costs" of providing the service. This can result in a "ripple effect" of further economic distortions when it is kept in mind that IXCs compete for long distance customers, and minutes of use, with CLECs, CMRS carriers, and some ILECs that have been allowed to enter the long distance business.

B. IXCs' Refusal to Pay Access Charges to CMRS Carriers While Paying Such Charges to ILECs and CLECs is Unreasonable Discrimination That Violates Section 202(a) of the Communications Act

Western Wireless also concurs with Sprint PCS that the refusal of IXCs to compensate CMRS carriers fairly for the use of their networks while simultaneously paying access charges to similarly-situated ILECs and CLECs is unreasonable discrimination in direct contravention of Section 202(a) of the Communications Act of 1934, as amended. Discrimination is not *per se* illegal under the Act – it is only when there is no reasonable basis for the discrimination that a violation occurs. Accordingly, the central question is whether CMRS carriers are situated so differently from ILECs and CLECs that such discrimination is reasonable and justifiable. A review of the situation leads ineluctably to the conclusion that this discrimination is not reasonable or justifiable, but merely a self-serving, unilateral attempt by IXCs to shift costs away from themselves to CMRS carriers.

AT&T devotes a significant amount of the discussion in its Petition to an attempt to differentiate between CMRS carriers and ILECs, in order somehow to justify the disparate treatment of paying one class of carriers (ILECs and CLECs) access charges to compensate it for the costs imposed, while refusing even to consider compensating the other class (CMRS carriers)

for imposing the same sorts of costs. AT&T claims that "the wireless market shares none of the characteristics that have justified the imposition of access charges on IXCs." AT&T Petition at 10. For one thing, AT&T asserts, wireless end user rates are unregulated, allowing wireless carriers to recapture their costs from end users, whereas wireline local rates have historically been maintained at artificially low levels, requiring subsidization by access charges. *Id.* at 11. In addition, AT&T claims that, since CMRS carriers did not from their inception charge access rates, they had no "reasonable settled expectation of receiving access payments from IXCs." *Id.* at 13.

There are obvious flaws with AT&T's analysis, such as the implicit comparison of CMRS providers to monopoly ILECs whose local rates are largely regulated instead of to competitive LECs whose local rates are unregulated. AT&T pays access charges to competitive wireline carriers even though they, like CMRS carriers, theoretically could recover the costs of terminating AT&T's traffic from end users. So the question of whether rates for local service are regulated or not is not a key distinction between the types of entities AT&T chooses to pay for access, and those AT&T chooses not to pay. Similarly, whether CMRS carriers have or had "a reasonable expectation" of being paid for the costs they incur on AT&T's behalf does not constitute a valid distinction that would justify discriminatory treatment. The question is whether CMRS carriers are legally distinct from wireline carriers in a way that is cognizable for purposes of the Act. Whether or not CMRS carriers "expected" to be paid is not determinative. Certainly, Sprint PCS and other CMRS carriers that submitted invoices to AT&T for access charges expected to be paid, at least until AT&T refused to deal with them.

In fact, the only relevant comparison between CMRS carriers and wireline carriers for purposes of this inquiry is that both types of carriers – based on AT&T's own admission – in fact

incur costs on behalf of AT&T and other IXCs when they originate or terminate traffic on the IXC's behalf. The question of how the wireless or wireline carrier allocates costs *internally* (i.e., whether it can recover these costs some other way, either by raising its prices to its end users or perhaps decreasing its return to investors) is not directly pertinent to this discussion: the essential questions remain (i) whether CMRS carriers have the right to recover costs from IXC cost-causers, and (ii) whether AT&T has any legally cognizable claim to receive service from CMRS carriers free of charge. CMRS carriers, CLECs and ILECs are the same for purposes of Section 202(a) of the Act: all have these external costs imposed upon them by IXCs. There is no distinction between these entities that justifies disparate treatment under law. AT&T's assertions to the contrary are merely self-serving attempts to foist its costs on an unrelated entity for its own benefit and without regard to the harm it causes to the ratepayers and investors of wireless companies.

C. IXCs' Refusal to Pay Access Charges to CMRS Carriers While Paying Such Charges to ILECs and CLECs is an Unjust and Unreasonable Practice that Violates Section 201(b) of the Communications Act

Finally, Sprint PCS is also correct in its assertion that the refusal to pay access charges to CMRS carriers is an unjust and unreasonable practice that violates Section 201(b) of the Act. As pointed out in Sprint's Petition (page 10), there is no legal basis for AT&T to "pick and choose" between entities that it will compensate for the costs of traffic origination and termination, and entities that it will not compensate. If AT&T believes that the charges asserted by the CMRS carrier are unreasonably high, its remedy under law is to convene a rate case to examine whether the charges are reasonable. *See* Sprint Petition at 7.

II. The Commission Should Deny AT&T's Petition for Declaratory Ruling in its Entirety

In Western Wireless' opinion, nothing contained in AT&T's Petition seeking to prohibit payment of access charges to CMRS carriers (or, in the alternative, to limit such payments to prospective payments only at TELRIC-based reciprocal compensation rates) is sufficiently persuasive to overcome CMRS carriers' entitlement to be fairly compensated for the costs they incur as a result of actions by unrelated third-party IXCs such as AT&T. Essentially, AT&T wants to foist costs it incurs in providing its long distance services on CMRS carriers and their customers: no matter how that is packaged, it is nevertheless a self-serving attempt to avoid recognition and payment of costs it causes, shifting them away from itself to others. This sort of strategy may have worked well when AT&T and the principal incumbent local exchange carriers were all essentially one entity, and political or other considerations caused costs to be shuttled back and forth between commonly-owned companies. This approach does not make sense, however, when "allocating" costs between unrelated entities such as AT&T's long distance end users and Western Wireless' or Sprint PCS' wireless local service end users.

AT&T seeks to create the impression in its Petition that the "bill and keep" regime has been in place in the CMRS industry, that it is the most simple solution from the regulatory view, since it does not require imposition or monitoring of rates, and that a departure from this regime would create significant problems for federal and state regulators. This, however is a somewhat slanted depiction of the prevailing situation.

The "bill and keep" concept is more appropriate in dealings between, *e.g.*, a CMRS carrier or CLEC and an ILEC, where both companies terminate traffic on each others' networks. But this situation is conceptually distinct from that prevailing in the relationship between AT&T and, say, Sprint PCS, where Sprint PCS does not originate or terminate any traffic on AT&T's

network (and therefore causes AT&T to incur zero costs on Sprint's behalf), whereas AT&T terminates and originates a great deal of traffic on Sprint's network, causing a unilateral cost incursion by Sprint PCS. In this situation, the conceptual basis for "bill and keep" is not clear at all: is it just and reasonable to impose a non-compensatory scheme, resulting in a windfall to one company, and an economic detriment to another, simply because it would be simpler from a regulator's point of view? Clearly, to the extent that CMRS companies incur and recognize costs caused by IXCs, and wish to be compensated for those costs, they should be entitled to receive fair compensation, and the regulatory mechanisms to enable them to do so should be put in place. The argument that this is "too much trouble" for regulators and in contravention of the deregulatory trend is a self-serving one from AT&T, considering the convenient truth that AT&T is the sole entity deriving benefit.

Likewise, AT&T's arguments that any compensation to CMRS carriers should be limited to TELRIC-based reciprocal compensation rates, applied only prospectively, should be rejected. To the extent that a CMRS carrier has asserted its right to compensation for the use of its network, but has been refused, that carrier should be entitled to recover its fair costs. And those costs should be determined as a distinct category of costs, and should not simply mirror reciprocal compensation rates. In the case of CLECs, the Commission did not require access charges to mirror rates for local transport and termination, and it should not do so in this case.

Finally, AT&T's assertion that, if CMRS carriers are permitted to charge access charges, it would necessitate regulation of CMRS end user rates as well, to "prevent double recovery" (*see* AT&T Petition at 27) is a red herring. The CMRS industry is competitive, and carriers must attempt to price their offerings in competition with other carriers to attract and keep customers. The notion that compensating CMRS carriers for costs they incur on behalf of third party entities

such as AT&T could lead to an unjust "double recovery" disregards the competitive nature of CMRS service pricing.

AT&T's purported concerns about creating a potentially unjust situation are rather remarkable in light of the fact that the only real injustice would be to tolerate the present situation any longer. At present, AT&T and other IXCs are unjustly causing CMRS carriers to incur costs on their behalf without any compensation, while they discriminatorily continue to compensate other classes of carriers for the same transaction. This situation unfairly penalizes CMRS end users by placing additional cost pressures on their rates, while at the same time creating an unentitled windfall for AT&T and its customers. The only "double recovery" in evidence here is AT&T's current ability to recover its rates for service it provides to its long distance customers without having to expend the real costs of providing that service because it is able to disregard a portion of those costs.

Sprint makes an important point in its Petition (at page 11) when it notes that CMRS carriers will never be able to achieve competitive status with incumbent LECs when CMRS carriers are denied an entire category of compensation that both ILECs and CLECs currently receive. Why should CMRS carriers alone be required to provide for free what every other carrier is able to charge for? And why should AT&T and other IXCs receive the windfall benefit of being able to disregard costs they impose on unrelated entities?

CONCLUSION

Based on the foregoing, Western Wireless submits that the Petition for Declaratory Ruling submitted by Sprint PCS on October 22, 2001 should be granted, and the AT&T Petition filed on the same date should be denied in its entirety.

Respectfully submitted,

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Date: November 30, 2001

CERTIFICATE OF SERVICE

I, the undersigned Michele Butler, a secretary in the law firm of Kelley Drye & Warren LLP hereby certify that true and complete photocopies of the foregoing "Comments" was served November 30, 2001 via courier and U.S. Mail on the following:

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